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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE BERRY,

Defendant and Appellant.

D065075

(Super. Ct. No. SCN322381)

APPEAL from a judgment of the Superior Court of San Diego County,

Harry M. Elias, Judge. Affirmed.

Johanna S. Schiavoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Parag Agrawal, Randall D. Einhorn, and Neru Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Eddie Berry for failing to register as a sex offender by failing to update his change of residence. The court found true a strike prior conviction, but

granted Berry's motion to strike the conviction. The court later sentenced Berry to three years in prison, but stayed the sentence and placed Berry on three years of formal probation. Berry contends he should have been permitted to bar revelation of his status as a sex offender from the jury. We reject his assertions and affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Before trial, the People moved to admit evidence that Berry (1) had a prior criminal conviction for failing to register as a sex offender to show Berry's knowledge of the registration requirement, and (2) had a conviction under Penal Code section 288, subdivision (c)(1) that required him to register as a sex offender. (Undesignated statutory references are to the Penal Code.)

Defense counsel submitted that Berry was willing to stipulate that he had been convicted of an offense requiring him to register with the police department every 30 days or within five days, depending on the situation, and that the allegation in the present case was that he failed to do so. Defense counsel also wanted any mention of being a sex offender eliminated from CALCRIM No. 1170. The trial court overruled defense counsel's objection to evidence being admitted as to Berry's status as a sex offender and also denied the request to modify the jury instruction to omit reference to Berry's status as a sex offender. The prosecutor read the following stipulation to the jury:

"It is agreed by both parties for the purpose of this trial and any and all motions arising therefrom that . . . Berry was previously convicted of a violation of [section] 288 subsection c subsection one, a lewd act upon a child 14 or 15 years of age being at least ten years older than the child in case number CD168796 in the Superior Court, County of San Diego, California 2002 offense which requires sex offender registration pursuant to . . . section 290 and that . . . Berry

had actual knowledge of his duty under . . . section 290 to register as a sex offender."

The trial court also instructed the jury with CALCRIM No. 1170 which informed them that Berry was charged with failing to register "as a sex offender" and to find Berry guilty of this offense, the prosecution was required to prove he (1) was previously convicted of an offense that required him to register under section 290, (2) resided in Oceanside, California, (3) actually knew he had a duty under section 290 to register as a sex offender and that he had to register within five working days of changing his residence address and location, and (4) willfully failed to register as a sex offender with the police chief of that city within five working days of changing his residence within that city. The jury found Berry guilty of failing to register as a sex offender by failing to update his change of residence. Berry timely appealed.

### DISCUSSION

Berry contends the trial court erred when it refused to (1) accept his stipulation that he was subject to the registration requirements under section 290 and that he knew of his duty to register, and (2) modify the pattern jury instruction, CALCRIM No. 1170, to omit any reference to his prior conviction of a sex offense. He contends that his status as a sex offender was irrelevant and highly prejudicial.

All relevant evidence is admissible at trial and a trial court "has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence." (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167; see Evid. Code, § 351.) Relevant evidence includes all "evidence . . . having any tendency in reason to prove . . .

any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court, however, may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (Evid. Code, § 352.) "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome [citation].'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

In making his arguments that the trial court erred in refusing his stipulation and in admitting evidence of his sex offender status, Berry asserts *People v. Valentine* (1986) 42 Cal.3d 170 (*Valentine*) and *People v. Hall* (1980) 28 Cal.3d 143 (*Hall*) are analogous and we should not follow *People v. Cajina* (2005) 127 Cal.App.4th 929 (*Cajina*), which rejected a similar argument.

In *Hall*, our high court explained that "if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury." (*Hall, supra*, 28 Cal.3d at p. 152.) This rule of exclusion is subject to limitations, including if the evidence "would hamper a coherent presentation of the evidence on the remaining issues." (*Id.* at 152-153.) In *Hall*, the charge at issue was possession of a concealable

firearm by an ex-felon. (*Id.* at p. 147.) Significantly, our high court set a caveat to its rule of exclusion: "No opinion is expressed on the application of this rule to any other section of the Penal Code." (*Id.* at p. 156.)

In *Valentine*, the charge at issue was also possession of a concealable firearm by an ex-felon. (*Valentine, supra*, 42 Cal.3d at p. 176.) For the charge of being an ex-felon in possession of a concealable firearm, any prior felony, regardless of its nature, satisfies the ex-felon element. (*Id.* at pp. 176-177.) After discussing *Hall*, our high court concluded that if the defendant stipulates to the fact of the prior felony conviction, the nature of the prior felony conviction becomes "utterly irrelevant" to the charge. (*Valentine*, at pp. 176-178, 181-182.)

Berry's reliance on *Hall* and *Valentine* is misplaced. As the *Valentine* court recognized, a constitutional amendment abrogated the holding in *Hall*, allowing a defendant charged with being a felon in possession of a firearm to admit the prior felony and thereby withhold the fact of ex-felony status from the jury. (*Valentine, supra*, 42 Cal.3d at p. 172; also *People v. Bouzas* (1991) 53 Cal.3d 467, 476 [discussing Cal. Const., art. I, § 28(f)].) Additionally, our high court has since concluded that the trial court's decision on whether to force the prosecution to accept a stipulation in lieu of evidence is a matter within its discretion, as is its implicit resolution of the probative and prejudicial weight of the evidence. (*People v. Waidla, supra*, 22 Cal.4th at p. 723 & fn. 5.) Rather, the general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. (*Old Chief v. United States* (1997) 519 U.S. 172, 186-

187 ["[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."]; *People v. Garceau* (1993) 6 Cal.4th 140, 182.)

Here and in *Cajina*, the charge at issue was failing to register as a sex offender. (*Cajina*, *supra*, 127 Cal.App.4th at p. 931.) Unlike the crime of being an ex-felon in possession of a concealable firearm, the prior offender element cannot be satisfied by any prior felony conviction. Rather, the prior offender element can only be satisfied by a prior felony conviction for an enumerated sex offense. (§ 290, subd. (c).) In other words, to establish the crime of failing to register as a sex offender, the prosecution must prove the defendant had a prior felony conviction for a sex offense specifically enumerated in the Sex Offender Registration Act. As the *Cajina* court explained, "prosecutors are not required to stipulate to the existence of any elements of the crime they are trying to prove where the stipulation will impair the effectiveness of their case." (*Cajina*, at p. 933.) We agree with the reasoning in *Cajina* and conclude the trial court did not abuse its direction by refusing to eliminate from trial any mention of Berry's status. The elimination of this fact would hamper a coherent presentation of the evidence on the remaining issues as the jury would be left wondering why Berry was required to inform law enforcement of his change of address. As the *Cajina* court observed, "If the jury is not informed why this defendant is subject to such a seemingly onerous obligation, the People . . . would 'look overbearing.'" (*Ibid.*)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.